IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

JARROD MCKINNEY, *Plaintiff*, v. THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture, *et al.*, *Defendants*.	No. 2:21-cv-00212-RWS

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF RELATED CLASS ACTION

Jarrod McKinney is a member of a certified class in ongoing litigation in the Northern District of Texas. The claims pressed on Plaintiff's behalf there are substantively identical to those he presses here: that § 1005 of the American Rescue Plan Act violates equal protection under the Constitution. Defendants seek to stay these proceedings while Plaintiff's claims are litigated in the class action. Mr. McKinney asserts a novel right to have his claims litigated in two courts simultaneously—and, presumably, to accept whichever of the two judgments he prefers. As explained, courts routinely stay, or even dismiss, an individual action in favor of a class action, for reasons of judicial economy and to prevent inconsistent results. Although Plaintiff tries to distinguish the cases Defendants cited, he fails to identify any competing line of authority. The Court should grant the stay.

I. A stay is warranted.

As Defendants demonstrated, and Mr. McKinney does not rebut, courts regularly exercise their discretion to stay individual suits while a class action is litigated on behalf of the individual plaintiffs.[1] That is because, as the Fifth Circuit has explained in affirming the *dismissal* of such claims, "[t]o allow individual suits would interfere with the orderly administration of the class action and risk inconsistent adjudications." *Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988). Instead, "[i]ndividual members of the class . . . may assert any equitable or declaratory claims they have, but they must do so by urging further action through the class representative and attorney, including contempt proceedings, or by intervention in the class action." *Id.*

Just so here: allowing Mr. McKinney's claims to proceed in this Court while they simultaneously proceed in the *Miller* litigation would interfere with that action and risk contradictory

[1] *See, e.g.*, *Wagner v. Speedway LLC*, 2021 WL 1192691, at *1 (N.D. Ill. Mar. 30, 2021); *Aleman ex rel. Ryder Sys., Inc. v. Sancez*, 2021 WL 917969, at *2 (S.D. Fla. Mar. 10, 2021); *Hollins v. Hendricks*, 2021 WL 535842, at *2 (D. Or. Feb. 12, 2021); *Bouas v. Harley-Davidson Motor Co. Group, LLC*, 2020 WL 2334336 (S.D. Ill. May 11, 2020); *Richard K. v. United Behavioral Health*, 2019 WL 3083019, at *7 (S.D.N.Y. June 28, 2019), *R&R adopted*, 2019 WL 3080849 (S.D.N.Y. July 15, 2019); *Gonzales v. Berryhill*, 18-cv-603, ECF No. 28 (D.N.M. Mar. 5, 2019); *Emerson v. Sentry Life Ins. Co.*, 2018 WL 4380988 (W.D. Wis. Sept. 14, 2018); *Jiaming Hu v. DHS*, 2018 WL 1251911, at *4 (E.D. Mo. Mar. 12, 2018); *Guill v. All. Res. Partners, L.P.*, 2017 WL 1132613, at *3 (S.D. Ill. Mar. 27, 2017); *McDaniels v. Stewart*, 2017 WL 132454 (W.D. Wash. Jan. 13, 2017); *Bargas v. Rite Aid Corp.*, 2014 WL 12538151 (C.D. Cal. Oct. 21, 2014); *Sanchez-Cobarrubias v. Bland*, 2011 WL 841082 (S.D. Ga. Mar. 7, 2011).

judgments. Defendants seek to stay these proceedings, not dismiss them. Such a course protects Mr. McKinney's ability to revive this suit in his preferred forum should circumstances later permit. Courts around the country have "routinely" found it appropriate to stay a case brought by an individual plaintiff "where, as here, the claims made in an individual lawsuit overlap with the claims being pursued by a certified class of which the individual is a member." *Richard K.*, 2019 WL 3083019, at *7.

Mr. McKinney baldly asserts that "Courts in this Circuit routinely deny similar motions where, as here, there are significant differences in litigation strategy and it is more convenient for Plaintiff to press his claims in the district in which he resides." Pl.'s Opp. at 2. But he does not cite even one case from this Circuit denying a stay in comparable circumstances. Instead, he tries to obscure the nature of the *Miller* litigation and the reasons undergirding common judicial practice. As to *Miller*, Mr. McKinney misleadingly suggests that the class counsel's intent to file a second amended complaint will slow that litigation—failing to mention that the stated purpose of that amendment is to *narrow* the litigation to the constitutional challenge to § 1005 advanced on behalf of members of the certified classes (including Mr. McKinney). *Compare* Pl.'s Opp. at 7 with ECF 32-2 (*Miller* Joint Report) at 2. And that litigation—which was filed before Mr. McKinney initiated this suit—is already moving at a faster pace than this litigation. Unlike here, in *Miller*, the court has already adjudicated a preliminary injunction, Defendants have answered the relevant claims, and the parties have proposed a schedule.

There is thus no force to Plaintiff's assertion that a stay will be immoderate. Mr. McKinney's claim will not sit idle during the stay. Quite the opposite, his claim will proceed apace *in the class action*, together with the claims of all members of the certified classes. In *those* circumstances—*i.e.*, "where, as here, the claims made in an individual lawsuit overlap with the claims being pursued by a certified class of which the individual is a member"—stays are "routine[]." *Richard K.*, 2019 WL 3083019, at *7. And, given that the individual plaintiff's claim still proceeds, such stays are not "immoderate" even though they remain in place "pending [] resolution of" the class action. *Aleman*, 2021 WL 917969, at *2 (explaining earlier-entered stay); *see also, e.g.*, *Richard K.*, 2019 WL 3083019, at *8; *Jiaming Hu*, 2018 WL 1251911, at *4; *Taunton Gardens*, 557 F.2d at 878; *Gonzales*, 18-cv-603, ECF No. 28.

Plaintiff's reliance on the recent denial of a similar stay request in *Holman v. Vilsack* is

misplaced. First, Defendants respectfully disagree with that decision, which misunderstood a class member's ability to opt out of a Rule 23(b)(2) class. *See infra*. This Court should not compound that court's mistake by permitting additional duplicative litigation. Second, that decision turned on factors not present here, such as the availability of a specific Sixth Circuit precedent and the *Holman* plaintiffs' maintenance of a separate claim not raised by Mr. McKinney. Third, the *Holman* litigation had advanced further than this litigation has, with that court having already issued a preliminary decision on the merits. And, as just explained, Mr. McKinney's claim will not wither on the vine during a stay, but instead will proceed in the separate action already pending in the Northern District of Texas.

Mr. McKinney will not be harmed by a stay. His immediate interests are already protected by three preliminary injunctions, including one entered by the *Miller* court itself. *See* Order, *Faust v. Vilsack*, No. 21-548 (E.D. Wis.), ECF 49 (staying consideration of plaintiffs' motion for a preliminary injunction because plaintiffs "have the protection they seek" by virtue of a nationwide injunction of § 1005). Mr. McKinney objects to certain claims raised in the *Miller* litigation, but concedes both that the *class* claims are limited to the challenge to § 1005 and also that class counsel has indicated they will "likely" amend the complaint to drop the claims (brought only by the individual plaintiffs) that Mr. McKinney complains of. Mr. McKinney also objects that class counsel has indicated it does not believe factual discovery is necessary, whereas Mr. McKinney apparently thinks that "paperwork regarding Mr. McKinney's race" may be important to adjudicating this facial challenge to an Act of Congress.[2] Mr. McKinney's request for one dollar in nominal damages also is no reason to deny a stay. That request is not a separate claim, but a remedy; Mr. McKinney does not explain how that request has any bearing on these proceedings or differentiates them from those in *Miller* in any appreciable way.

Plaintiff also contends he will be prejudiced by a stay because he will lose control of the litigation. Such concerns are commonly raised and rejected and are no reason to deny a stay. *See, e.g.*, *Emerson*, 2018 WL 4380988, at *2 (granting stay when nonmovant "fail[ed] to provide a plausible account of what she stands to lose by proceeding as a member of the [other action's] class, other than

[2] Facts relevant to standing likely could be resolved by stipulation, should this case proceed.

representation by the counsel of her choice"). As part of the class certification in *Miller*, a district judge already determined that class counsel "will adequately represent the interests of class members similarly situated in zealously pursuing the requested relief." *Miller* Order 12, ECF 24-1. Principles of judicial comity counsel against this Court second-guessing or interfering with that determination. *Cf. Med. & Chiropractic Clinic, Inc. v. Oppenheim*, 981 F.3d 983, 992 (11th Cir. 2020) (certifying court alone decides Rule 23 questions). Mr. McKinney's "rights and grievances as to [Defendants] will be protected and adjudicated just like any other class member's." *Emerson*, 2018 WL 4380988, at *2. And, to the extent Plaintiff disagrees with the approach taken by class counsel, procedural mechanisms such as intervention may be available for him to raise his concerns in the *Miller* litigation.[3] Regardless, any concerns Plaintiff has with the litigation approach taken in *Miller* will hold regardless of whether a stay is entered in this case, because his claims *are* being litigated in *Miller*, by class counsel, in the Northern District of Texas. Whatever the merits of Plaintiff's concerns over the way that case is litigated, they do not give reason to permit him to also litigate his claim simultaneously in a separate forum.

Mr. McKinney suggests he may try to opt out of the *Miller* litigation. Pl.'s Opp. at 11 n.11. But a stay "accommodates the possibilit[y]" that the *Miller* court could grant a hypothetical future motion by Plaintiff to opt out of the classes or that the classes could be decertified. *Richard K.*, 2019 WL 3083019, at *8; *see also Thiele v. Energen Res. Corp.*, 2015 WL 13899009, at *2 (D. Colo. Dec. 7, 2015). Because, at present, Plaintiff "remains a member" of the *Miller* classes, he is litigating his claim in two fora, *Richard K.*, 2019 WL 3083019, at *8. This condition is contrary to the purpose of a (b)(2) class, to the rule against maintaining two separate, like actions, and to the overwhelming weight of authority.[4]

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[3] Mr. McKinney complains that class counsel has "never communicated with Mr. McKinney," but neglects to mention that class counsel specifically committed to notifying Mr. McKinney's counsel concerning the class litigation. *See* ECF No. 32-2 at 5.

[4] In any event, Plaintiff is unlikely to succeed in any attempt to opt out of the *Miller* classes, which were certified under Rule 23(b)(2). As the Supreme Court has explained, (b)(2) classes are "*mandatory* classes: The Rule *provides no opportunity* for (b)(1) or (b)(2) class members to opt out[.]" *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338, 361-62 (2011). Individual opt-outs are incompatible with Rule 23(b)(2) classes seeking injunctive relief, as such "relief *must perforce* affect the entire class at once." *Wal-Mart Stores*, 564 U.S. at 361-62; *id.* at 360 ("[K]ey to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be

Mr. McKinney also misses the point of the stay Defendants seek. It is not simply to avoid the burden of defending this lawsuit. It is to avoid interference "with the orderly administration of the class action." *Gillespie*, 858 F.2d at 1103. It is to minimize the "risk [of] inconsistent adjudications." *Id.* It is to ease the burden on both the Court and on Defendants of "*duplicative* litigation" in multiple fora. *Parallel Networks Licensing, LLC v. Superior Turnkey Sols. Grp., Inc.*, 2020 WL 2098203, at *2 (E.D. Tex. May 1, 2020) (emphasis added); *see also ACF Indus., Inc. v. Guinn*, 384 F.2d 15, 19 (5th Cir. 1967).

II. The "first-filed" rule also counsels against permitting this litigation to proceed.

For the reasons given above, in Defendants' motion, and in the cited authorities, the Court should stay these proceedings. But the distinct "first-filed" rule provides another reason not to permit this litigation to proceed in this Court. Plaintiff cannot seriously contend that this litigation does not "substantially overlap" with the *Miller* litigation. Plaintiff here is also class-member plaintiff in *Miller*, and the defendant in *Miller* is also a defendant here. *See Miller*, No. 4:21-cv-595, Am. Compl. (ECF No. 11). Both cases challenge the same statutory provision on the same constitutional theory. *See Int'l Fid. Ins. Co. v. Sweet Little Mexico Corp.*, 665 F.3d 671, 678 (5th Cir. 2011) (whether "the core issue . . . was the same"). That the *Miller* action includes additional plaintiffs, and that this case also names a subordinate official at USDA, does nothing to undermine the logic of the first-to-file rule. *Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 951 (5th Cir. 1997) (complete identity of parties not required).

The Court need not consider Plaintiff's dubious arguments concerning equitable factors. Pl.'s Opp. at 12-15. Should the Court, contrary to the cited reasons and case law above, deny a stay and then separately consider whether to apply the "first-filed" rule, its only task would be to determine whether the cases substantially overlap and transfer; once that the court concludes there is substantial overlap, "it [is] no longer up to the [second filed court] to resolve the question of whether both should be allowed to proceed." *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 605–06 (5th Cir. 1999).

Accordingly, the Court should stay these proceedings pending resolution of the *Miller* action.

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enjoined or declared unlawful only as to all of the class members or as to none of them."). *See also Holmes v. Cont'l Can Co.*, 706 F.2d 1144, 1157 (11th Cir. 1983); *see also Rosado v. Wyman,* 322 F. Supp. 1173, 1193-94 (E.D.N.Y.); *Messier v. Southbury Training Sch.*, 183 F.R.D. 350, 355-56 (D. Conn. 1998).

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CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2021, a copy of the foregoing reply brief was filed electronically via the Court's ECF system, which effects service on counsel of record.

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